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IN THE
Supreme Court of the United States

GUY MITCHELL, *et al.*,
Petitioners,
v.
MARY L. HELMS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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This brief *amicus curiae* is filed by the National Education Association ("NEA") with the written consent of the parties, as provided in the Rules of this Court.

INTEREST OF AMICUS CURIAE [1]

NEA is a nationwide employee organization with approximately 2.4 million members, the vast majority of whom are employed by public schools, colleges, and universities throughout the United States. NEA is strongly committed to the preservation and improvement of public

[1] Counsel for a party has not authored this brief in whole or in part. No person or entity other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or filing of this brief.

education, and to the constitutional principle of separation between church and state. Because of these dual commitments, NEA has a vital interest in the question presented in this case—*i.e.*, whether, and to what extent, the Establishment Clause permits government to lend instructional materials and equipment to sectarian schools.[2] In addition to its interest in this specific question, NEA actively is involved in the national debate—and ongoing litigation—regarding "vouchers" and other programs pursuant to which public funds are used to pay for students to attend sectarian schools. The outcome of this case could have significant implications for the constitutionality *vel non* of such programs as well.

SUMMARY OF ARGUMENT

This case brings to mind Justice Jackson's observation in *First National Bank v. United Air Lines*, 342 U.S. 396, 398 (1952) (Jackson, J., concurring), that "sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place in which we chose to lodge." Petitioners and the Secretary of Education agree as to where this Court should end up—they both maintain that the decision of the Court of Appeals should be reversed—but they "part company . . . as to the road [this Court should] travel to reach [that] destination." *Id.* We disagree with the destination that petitioners and the Secretary would have this Court reach, but our more fundamental concern—both for this case and for Establishment Clause jurisprudence generally—is with the paths they would have this Court travel.

Petitioners seek to reduce this Court's Establishment Clause jurisprudence to a simplistic "neutrality" principle

[2] The term "sectarian school" is used herein to mean a private school that is affiliated with a religion group, institution, or organization, and/or that seeks through its educational program to inculcate religious beliefs.

that would open the door to unprecedented government funding of religious activities. The Secretary, in contrast, starts down the proper path by recognizing that government must not be allowed to provide financial support for religious activities, even in a "neutral" manner; but the Secretary veers off the proper path by failing to appreciate that religious activities are in fact impermissibly subsidized when government aid goes to schools in which the secular and sectarian components of the educational program are inextricably intertwined, or when government provides facially-neutral instructional materials or equipment that readily can be shifted from the secular to sectarian component of the program.

ARGUMENT

I. GOVERNMENT AID CAN BE PROVIDED TO SECTARIAN SCHOOLS ONLY IF SUCH AID IS CONFINED TO SECULAR FUNCTIONS

A. Although "[n]eutrality, in both form and effect, is one hallmark of the Estabiishment Clause . . ., there exists another axiom in the history and precedent of the . . . Clause." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring). That axiom is that "[p]ublic funds may not be used to endorse the religious message." *Id.* at 846-47 (quoting *Bowen v. Kendrick*, 487 U.S. 589, 642 (1988) (Blackmun, J., dissenting)). This "funding prohibition," *Rosenberger*, 515 U.S. at 852 (O'Connor, J., concurring), is just as central to Establishment Clause jurisprudence as the "neutrality principle." *id.* It reflects this Court's understanding that "the . . . evils against which the Establishment Clause was intended to afford protection," *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), include not only "sponsorship" and "active involvement of the sovereign in religious activity," but "financial support" as well,

id. (*quoting Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)).

This Court never has wavered from the principle that "[a]id to a religious institution unrestricted in its potential uses, if properly attributable to the State, is 'clearly prohibited under the Establishment Clause.'" *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 489 (1986) (quoting *School District of Grand Rapids v. Ball*, 473 U.S. 373, 395 (1985)). "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from [this Court's] cases that direct aid in whatever form is invalid." *Committee for Public Education v. Nyquist*, 413 U.S. 756, 780 (1973)

B. The prohibition against the use of public funds to pay for religious activities that is at the core of the Establishment Clause means that any government assistance to sectarian schools must be confined either to matters that do not have any educational content—such as transporting students to such schools[3]—or to the purely secular aspects of the schools' educational program. This Court's determination that public funds would be used only for secular functions was the basis for its approval of the provision to sectarian schools (on equal terms with nonsectarian schools) of textbooks,[4] diagnostic services,[5] and

[3] *See Everson v. Board of Education*, 330 U.S. 1 (1947).

[4] *See Board of Education v. Allen*, 392 U.S. 236, 248 (1968) (emphasizing that the record did not support the contention that textbooks might be used to teach religion); *Meek v. Pittenger*, 421 U.S. 349, 362 (1975) (same); *Wolman v. Walter*, 433 U.S. 229, 251-52 n.18 (1977) (reiterating the "unique presumption" that textbooks will not be put to religious uses).

[5] *Wolman*, *supra* note 4, 433 U.S. at 241-44.

state-prepared tests.[6] The same determination—that the government aid in question would not help to finance the teaching of religion—also was the basis for this Court's recent decision in *Agostini v. Felton*, 521 U.S. 203 (1997), which allowed public school teachers to provide Title I remedial educational services on sectarian school premises, subject to specified safeguards designed to assure that the teachers would engage only in secular instruction with no religious content. And, this secular-use limitation likewise explains why this Court has sustained certain programs pursuant to which public funds have been made available to religiously-affiliated institutions of higher education.[7]

The decisions approving such assistance have recognized that, "[o]f course, under the relevant cases the outcome would likely be different were there no effective means for insuring that the [funds] would cover only secular services." *Committee for Public Education v. Regan*, 444 U.S. 646, 659 (1980) (White, J.). When faced with the possibility that funds or services provided by a government program might be used to support the *religious* activities of sectarian schools, this Court consistently has found an Establishment Clause violation. *See, e.g., Meek v. Pittenger*, 421 U.S. 349 (1975) (instructional materials other than textbooks cannot be provided to sectarian schools because they might be used for religious teaching); *Wolman v. Walter*, 433 U.S. 229 (1977) (same; and funds cannot be provided for field trips because "public school authorities will be

[6] *Wolman*, *supra* note 4, 433 U.S. at 239-40; *Committee for Public Education v. Regan*, 444 U.S. 646 (1980).

[7] *See Tilton v. Richardson*, 403 U.S. 672, 680, 682-84 (1971) (plurality opinion); *Hunt v. McNair*, 413 U.S. 734, 744 (1973); *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 759-61 (1976) (plurality opinion).

unable adequately to insure [the] secular use of the field trip funds," *id.* at 254); *Nyquist*, 413 U.S. at 774 (maintenance and repair grants cannot be provided because they might be used to pay employees who maintain a chapel); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973) (Burger, C.J., for an 8-1 majority) (costs of testing cannot be reimbursed to sectarian schools, even though the testing is required by state law, where the tests are not prepared by the State and it cannot be assured that there will be no religious content); *Ball*, 473 U.S. at 286-88 (public funding of remedial and enrichment classes is impermissible where the classes are taught by parochial school teachers); *id.* at 399-40 (O'Connor, J., concurring) ("When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools"); *Bowen v. Kendrick*, 487 U.S. 589, 609-10, 621 (1988) (Rehnquist, C.J.) (grants for programs directed at adolescent sexual behavior and pregnancy cannot be provided to "pervasively sectarian" religious institutions, and cannot be used to fund religious activities in an otherwise secular setting); *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971) (college facilities constructed with public funds cannot be used for religious purposes even after twenty years have passed).

The prohibition against government support for religious activities has been applied not only when aid has been provided directly to sectarian schools, but also when attempts have been made to channel the aid through students or parents. *See Nyquist*, 413 U.S. at 780, 783 (partial reimbursement of tuition is unconstitutional "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclu-

sively for secular, neutral, and nonideological purposes"); *Sloan v. Lemon*, 413 U.S. 825 (1973) (same); *Wolman*, 433 U.S. at 248-50 (striking down loans to students of instructional materials other than textbooks, because such aid "flows in part in support of the religious role of the schools"). *See also Ball*, 473 U.S. at 394 (1985) (fact that aid flows through students or parents does not mean that it should not be seen as aid to sectarian schools); *Witters*, 474 U.S. at 487 ("[a]id may have th[e] effect [of a direct subsidy to sectarian schools] even though it takes the form of aid to students or parents").

Furthermore, even when government aid is directed solely to the secular functions of sectarian schools, the Establishment Clause is violated if the effect of the aid is to relieve the schools of expenses they otherwise would have incurred, thereby enabling them to shift additional resources to religious activities. In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12 (1993), this Court stated that government aid (in that case, to students) would constitute "an impermissible 'direct subsidy' " of a religious school if the effect of the aid were to "relieve[] [the school] of an expense that it otherwise would have assumed in educating its students." And, petitioners misread *Agostini* when they assert that "[t]he *Agostini* Court did not . . . hold that a 'supplement, not supplant' provision is constitutionally required." Brief for Petitioners ("Pet. Br.") at 26 n.16. To the contrary, this Court took pains in *Agostini* to satisfy itself that the Title I services at issue did not "supplant the remedial instruction and guidance counseling alrady provided in New York City's sectarian schools." 521 U.S. at 229.[8]

[8] Nor is the underlying principle at stake here implicated only in situations where government assistance directly "supplants" services previously provided by a sectarian school. If public funds were to cover a substantial portion of the costs of a sectarian edu-

C. Petitioners' "neutrality" theory of the Establishment Clause is bottomed principally on two cases in which this Court held that assistance provided to students could not properly be viewed as government support of religious activities merely because a student chose to use that assistance at a sectarian school. *See Witters, supra; Zobrest, supra.* The key to these two holdings is that the government aid was provided pursuant to programs of broad scope that in no way were skewed towards religion. Under those programs, the recipient was able to use the benefit at so many schools—the vast majority of which were nonsectarian—that his or her individual choice to use the benefit at a sectarian school could not properly be viewed as constituting government aid to religion, any more than a government employee's decision to use his or her paycheck for religious purposes could be so viewed. *Witters*, 474 U.S. at 486-87. *See also Zobrest*, 509 U.S. at 8 (analogizing challenged program to such universally available government services as police and fire protection).

In *Witters*, this Court held that sectarian schools did not have to be excluded from the otherwise unrestricted universe of education and training programs for which blind persons could use vocational rehabilitation assistance provided by the State of Washington. The Court emphasized that "the full benefits of the program [were not] limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are

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cation, whether by "supplanting" services previously provided by the schools or by providing "supplementation" that is sizeable in relation to the services paid for by the schools themselves, the Establishment Clause would be violated. *Ball*, 473 U.S. at 397.

made among a huge variety of possible careers, of which only a small handful are sectarian." 474 U.S. at 488. It also was "important[]," *id.*, that there was no indication that "any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education," *id.* Because the program was "in no way skewed towards religion," *id.*, and the "link" between church and state was so "highly attenuated," *id.*, the *Witters* Court found the program to be akin to the "salary donation" paradigm rather than to the "direct subsidy" paradigm. *Id.* at 487. While reaffirming that "aid to a religious institution unrestricted in its potential uses, if properly attributable to the State, is 'clearly prohibited under the Establishment Clause,'" *id.* at 489 (quoting *Ball*, 473 U.S. at 395), this Court concluded that an individual's decision to use his vocational rehabilitation assistance to pursue a religious career rather than one of the "huge variety of [other] possible careers" to which that assistance could be applied was not "properly attributable to the State."[9]

In *Zobrest*, this Court held that the Establishment Clause did not require that sign language interpreters provided to deaf students under the Individuals with Disabilities Education Act be excluded from providing interpretative services in sectarian schools. Noting that the statute provided benefits to any child found to be disabled—whether attending public or private school—the Court again emphasized the "broad class of citizens defined without reference to religion" to which the program applied, 509 U.S. at 8, and the fact that the program was "in no way skewed towards religion," *id.* at 10 (quoting

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[9] Nor should it be overlooked that *Witters* involved postsecondary education, where the Court has recognized that the potential for religious indoctrination is much less than in elementary and secondary schools. *See infra* note 15.

Witters, 474 U.S. at 488). Explaining that "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect," 509 U.S. at 9 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)), and that any financial benefit realized by sectarian schools as a result of the program was indirect and attenuated, *id.* at 10-11, this Court found that the Establishment Clause did not mandate the exclusion of religious schools from the program.[10]

Thus, *Witters* and *Zobrest* stand for the proposition that in certain narrowly defined circumstances—involving neutral allocation criteria, meaningful individual choice, *and* a broad public/private universe—government need not be viewed as the source of funds received by a sectarian school.

Quite obviously, that proposition has no application to a program—such as Title VI—under which government provides assistance to the schools themselves. There can be no doubt in such a case that the assistance is "properly attributable to the State." *Witters*, 474 U.S. at 489. *See id.* at 487 (explaining that the fact that vocational assistance was provided to the student, not the school, was "central" to the analysis); *Zobrest*, 509 U.S. at 10 (emphasizing that "no funds traceable to the government ever find their way into sectarian schools' coffers").

Petitioners read *Witters* and *Zobrest* more broadly, citing them for the proposition that public funding of religious activities is constitutional as long as the funds are provided pursuant to a facially neutral allocation formula and the ultimate destination of the funds is determined by the "independent decisions of private parties." Pet. Br. at 23. As indicated above, even if this were a correct reading of *Witters* and *Zobrest*, it would not aid petitioners here, inasmuch as Title VI materials and equipment are provided to the sectarian schools themselves. But, in fact, this proposition does not accurately reflect the teaching of those two cases.

[10] In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court likewise repeatedly emphasized that the benefit at issue—a tax deduction for a wide array of educational expenses incurred in public and private schools—went to a broad spectrum of recipients. *Id.* at 392, 397, 399. The Court's holding in *Mueller* was confined in any event to "genuine tax deduction[s]," which are accorded a "traditional rule of deference," *id.* at 397 n.6, and the Court emphasized that the challenged deduction for educational expenses was merely "one among many deductions" recognized in the Minnesota tax system, *id.* at 396.

This Court never has viewed mere facial neutrality as sufficient in and of itself to render government aid permissible under the Establishment Clause. As Chief Justice Rehnquist put it in *Bowen v. Kendrick*, "even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion." 487 U.S. at 609. *See also Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 747 (1976) (plurality opinion) ("[s]ecular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity"); *Rosenberger*, 515 U.S. at 846, 852 (O'Connor, J., concurring) (neutrality "*in both form and effect*" is one "hallmark" of the Establishment Clause, but does not override the "funding pohibition" of the Clause) (emphasis added).[11]

Witters and *Zobrest* do not signify—any more than do *Agostini* or *Rosenberg*—"the supremacy of the neutrality principle []or . . . the demise of the funding prohibition in Establishment Clause jurisprudence." *Rosenberger*, 515

[11] *Cf. Allen*, 392 U.S. at 249 (Harlan, J., concurring) (where government aid is challenged under the Establishment Clause, "[n]eutrality is . . . a coat of many colors").

U.S. at 857 (O'Connor, J., concurring). The Court did not suggest in *Witters* and *Zobrest* that the government aid programs challenged in those cases survived constitutional scrutiny simply because they allocated benefits on a facially neutral basis and private choice was involved in selecting the specific institutions at which the benefits would be used. Rather, as we have explained, crucial to the Court's approval of those programs was the fact that they operated across *so broad a spectrum* that the ultimate receipt of funds by a sectarian school simply could not be attributed to the government any more than a government employee's decision to spend his or her paycheck on religious activities could be attributed to the government. *Witters*, 474 U.S. at 486-87.[12]

In short, the "neutrality/private choice" doctrine touted by petitioners has very narrow bounds: it does not even come into play where, as here, government aid is provided directly to sectarian schools themselves; and it does not sustain the constitutionality of a government program pursuant to which students attending sectarian schools constitute a substantial portion of those who are eligible to receive benefits. *See Nyquist*, 413 U.S. at 768, 782-83 and n.38; *Meek*, 421 U.S. at 363.[13]

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[12] That was the situation in *Widmar* and *Rosenberger* as well—cases petitioners invoke as further support for the "neutrality" doctrine, but which are not directly on point because they involved the distinct isssue of access to a public forum. *Widmar* referred to "[t]he provision of benefits *to so broad a spectrum of groups*" as "an important index of secular effect." 454 U.S. at 274 (emphasis added). *Rosenberger* emphasized the "broad and diverse" viewpoints of the student groups that participated in the student-funded program at issue. *Id.* at 839. *See also id.* at 842 ("wide spectrum of student groups"); *id.* at 850 (O'Connor, J., concurring) ("widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University").

[13] Under the typical voucher/tax credit program, *see* Brief *Amici Curiae* of the Institute of Justice, *et al.*, at 18-21, the aid that is directed to students of private elementary and secondary schools generally flows in large measure to sectarian schools. Unlike the situation in *Witters* and *Zobrest*, such aid programs are "skewed towards religion," and the fact that they tend to result in significant public funding of sectarian schools is not some mere fortuity for which government is not to be held responsible under the Establishment Clause. Providing assistance that can be used only for a service—*e.g.*, private elementary and secondary education—that is furnished largely by sectarian schools hardly fits the *Witters* analogy of a government paycheck that can be used for services as to which sectarian institutions play only a marginal role.

The argument that such funding of private sectarian schools should be deemed defensible under the Establishment Clause to the extent that it merly provides benefits comparable to those available in public schools misses the mark. As the *Nyquist* Court observed, such a view "would . . . provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause." 413 U.S. at 782 n.38 (emphasis by the Court).

[14] The Secretary also recognizes the requirement, pointed out *supra* at 7, that the loaned Title VI materials and equipment

II. IN PERVASIVELY SECTARIAN PRIVATE SCHOOLS IT IS CONCEPTUALLY IMPOSSIBLE TO CONFINE THE USE OF TITLE VI MATERIALS AND EQUIPMENT TO SECULAR FUNCTIONS; IN OTHER SECTARIAN SCHOOLS, SUCH CONFINEMENT IS IMPOSSIBLE AS A PRACTICAL MATTER

Based upon the foregoing principles, it would be constitutional to lend Title VI materials and equipment to sectarian schools *only* to the extent that the use of those resources is confined to secular aspects of the schools' educational programs. Unlike petitioners, the Secretary of Education squarely acknowledges this limitation, *see* Brief for the Secretary of Education ("Sec. Br.") at 32-33; but the Secretary argues that it is satisfied here. *Id.* at 37-41.[14] The Secretary's position is untenable for two reasons.

A. The Secretary's argument begins with the assumption that there are separable secular components in the educational program of sectarian schools, such that Title VI resources could be directed solely to the secular components. In some sectarian schools this may indeed be the case, *see Ball*, 473 U.S. at 384 ("It is true that each school may not share all the characteristics of [pervasively sectarian] religious schools."), but the reality is that in most sectarian schools—in NEA's experience, the vast majority —the secular and sectarian aspects of the educational program are "inextricably intertwined," *Meek*, 421 U.S. at 366. "The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief." *Id.*

Sectarian schools themselves often are the first to acknowledge this fact. In *Ball*, for example, the parents' handbook of one school stated that the school's goal was "[a] God oriented environment which *permeates* the total educational program." 473 U.S. at 379 (emphasis by the Court). A policy statement issued by other schools declared that "it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but the *Word of God must be an all-pervading force in the educational program.*" *Id.* (emphasis by the Court). In a pending federal case in Ohio, one school's informational literature provides that "total religious instruction is the major focus of the educational program . . . . Lessons learned in formal religious classes are purposefully carried over into all subject areas;" and the parents' handbook of another school states that "a child needs to hear and learn the word of God constantly, and [t]his can be done only when the entire curriculum and the life of the school is grounded in the word of God and dedicated to the purpose of showing the love of the Savior to a world which without Him, would be lost forever." *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725, 729 (N.D. Oh. 1999).

must not enable sectarian schools "to shift their [financial] resources to religious purposes." *Id.* at 35-36. The Secretary argues that the "anti-supplantation rule" of 20 U.S.C. § 7371(b) and its implementing regulations ensure that this will not occur. *See* Sec. Br. at 42-43. We adopt respondents' position that, in this case, the reality has been otherwise.

Although "pervasively sectarian" is the term this Court has used to describe schools which have this type of educational program, *see Bowen v. Kendrick*, 487 U.S. at 620 n.16, petitioners—who interpret the term to refer to *all* "religious schools"—would ban it from the lexicon as "impl[ying] disapproval." Pet. Br. at 34 n.22. And, indeed, some members of this Court have questioned whether the term defines "a well-founded juridical category," *Bowen*, 487 U.S. at 624 (Kennedy, J., concurring); *see also id.* at 631 (Blackmun, J., dissenting) (characterizing "pervasively sectarian" as "a vaguely defined term of art"). But whatever the appropriate choice of words might be, there is no denying what this Court meant when it indicated—without intending disapproval, we would add—that "many of those schools," *Meek*, 421 U.S. at 366, are "pervasively sectarian." The Court was acknowledging the reality that, in a substantial percentage of sectarian schools (we need not for present purposes debate what that percentage is), the secular and sectarian aspects of the educational program are "inextricably intertwined," *id.*, the educational program includes religious indoctrination, worship, and the inculation of religious beliefs, and the educational program is designed to advance the religious mission of the school and its affiliated religious institution. This is not some legal presumption; it is a fact, and surely one of the "practical" considerations, Sec. Br. at 20, that must guide the inquiry in this area. It is a fact, moreover, that was found by the courts

below to characterize schools that have received Title VI resources in this case. *See Helms v. Cody*, 856 F. Supp. 1102, 1118 (E.D. La. 1994), *aff'd in pertinent part sub nom. Helms v. Picard*, 151 F.3d 347, 355 (5th Cir. 1998).

This Court was entirely correct, therefore, when it stated in *Meek* that "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize [loans of instructional materials and equipment] as channeling aid to the secular without providing direct aid to the sectarian." 421 U.S. at 365. The *Wolman* Court likewise properly recognized that, "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools." 433 U.S. at 250.

Nor do *Meek* and *Wolman* stand alone in recognizing the impermissibility under the Establishment Clause of providing government aid to institutions in which the secular functions that are the ostensible target of the aid are inextricably intertwined with religion. In *Hunt v. McNair*, 413 U.S. 734 (1973), the Court, speaking through Justice Powell, stated that "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Id.* at 743. The revenue bond program challenged in that case was upheld only after this Court determined that the recipient college was not a pervasively sectarian institution. *Id.* at 743-44. Precisely the same approach was applied in *Roemer*, where again this Court upheld an aid program only after

determining that the recipient colleges were not pervasively sectarian. 426 U.S. at 754-58.[15]

Chief Justice Rehnquist made the same point in *Bowen v. Kendrick*, when he commented that:

> One way in which direct government aid might have [the primary effect of advancing religion] is if the aid flows to institutions that are "pervasively sectarian." We stated in *Hunt* that
>
> > "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . ." 413 U.S., at 743. [487 U.S. at 610.]

This Court left little doubt that the program challenged in *Bowen* could not constitutionally provide aid "to grantees that can be considered 'pervasively sectarian' religious institutions, such as we have held parochial schools to be." *Id.* at 621. *See also Ball*, 473 U.S. at 399-400 (O'Connor, J., concurring) (agreeing that "[w]hen full-time parochial school teachers receive public funds to teach secular courses to their parochial school

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[15] It is noteworthy that the institutions found not to be pervasively sectarian in *Hunt* and *Roemer* were colleges. As the Court has observed, "[t]here are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Tilton*, 403 U.S. at 685. In contrast to classes in sectarian elementary and secondary schools, "college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines," *id.* at 686, which generally emphasize academic freedom and critical thinking, *id.* For other reasons as well, including the greater maturity of the students, *see id.*, the "potential for undue [religious] influence is far less significant with regard to college students who voluntarily enroll in courses [than for students in elementary and secondary schools]." *Edwards v. Aguillard*, 482 U.S. 578, 584 n.5 (1987).

students under parochial school supervision, . . . the program has the perceived and actual effect of advancing the religious aims of the church-related schools . . . particularly . . . where . . . religion pervades the curriculum and the teachers are accustomed to bring religion to play in everything they teach").

Nor is there anything in *Agostini* to contradict the view that, in the educational programs of many sectarian schools, there is no separable secular component. *Agostini* held only that it should not be presumed that a teacher *employed by a public school system* will attempt to inculcate religious beliefs whenever he or she provides Title I services on the premises of a sectarian school, noting that for such a teacher to do so would constitute a "depart[ure] from [the teacher's] assigned duties and instructions." 521 U.S. at 226. However, as Justice O'Connor —the author of the *Agostini* decision—explained in her concurrence in *Ball*, the *opposite* situation is presented when instruction is being provided by "full-time parochial school teachers . . . [who] are accustomed to bring religion to play in everything they teach." 473 U.S. at 399-400 (O'Connor, J., concurring). For teachers who are subject to the principles expressed in the parent handbooks and policy statements referenced above, *see supra* at 14-15, constant inculcation of religious beliefs throughout the school day is not a departure from "assigned duties and instructions;" rather, it is a standing obligation derived from the school's declared philosophy and mission.

The foregoing should be correctly understood. We by no means are suggesting that pervasively sectarian schools cannot provide their students with an adequate secular education. Our point is that there simply is no such thing as a separable secular component in the educational program of pervasively sectarian schools. And, at least as to such schools—which, we reiterate, probably constitute

the vast majority of all sectarian schools—the Secretary's suggestion that "more extensive safeguards" can "prevent the diversion of [Title VI] equipment and materials to sectarian purposes," Sec. Br. at 25, n.10, has no meaning. Phrased otherwise, such safeguards are a conceptual impossibility in schools where "[t]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence." *Meek*, 421 U.S. at 366.[16]

B. Accepting for present purposes that at least some sectarian schools "may not share all the characteristics of [pervasively sectarian] religious schools," *Ball*, 473 U.S. at 384, and that the educational programs in such schools do have an identifiable secular component, it is at least *conceptually* possible at such schools to do what the Secretary concedes is required under the Establishment Clause —*i.e.*, to confine the use of Title VI materials and equipment to secular instruction free from religious content. However, given the nature of the materials and equipment at issue here—computers, software, etc.—the Secretary's assertion that adequate "safeguards" can be put in place "to prevent the diversion of such equipment and materials to sectarian purposes," Sec. Br. at 25, n.10, is to say the least wishful thinking.

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[16] And, even if that were not the case, any effort to enforce a separation of the secular from the sectarian in these schools would run afoul of the "excessive entanglement" doctrine. Not only would such an effort necessarily entail "*pervasive* monitoring," *see Agostini*, 521 U.S. at 234 (emphasis by the Court), but it would place federal officials in the position of attempting to countermand the schools' guiding principle—often expressly stated—that a *refusal* to separate the secular from the sectarian is mandated by the religious mission that is "the only reason for the schools' existence." Such an effort to impose a "corrosive secularism," *Ball*, 473 U.S. at 385, on pervasively sectarian schools would itself be at war with the Establishment Clause. *See Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring).

The "safeguard[]" upon which the Secretary would rely in this regard is essentially the notion that compliance with the no-religious-use rule could be ensured "by checking logs and holding discussions with religious school officials." Sec. Br. at 44. Petitioners agree, noting that all that is required is that "equipment and materials be used only for courses in secular subjects," and "that restriction is easily administered through the requirement of usage logs for the equipment." Pet. Br. at 29. We need not resort solely to abstract analysis in order to demonstrate that this type of "honor system" would be insufficient to preserve the line of separation between church and state. The record in this case confirms the point.

What is more, petitioners give the game away by praising the Title VI guidelines as "[not] prevent[ing] a student from using a computer to gain access to a religious website, just as students can at a public school or public library." Pet. Br. at 29-30. What that comment overlooks is that, unlike the situation in a sectarian school, a student in a public school or public library who uses a computer to gain access to a religious website does so at his or her own initiative, *not* because the institution that received the computer from the government has directed him or her to do so. Thus, petitioners' revealing illustration only serves to highlight the fact that in sectarian schools, Title VI materials and equipment can be, have been, and undoubtedly would continue to be "diver[ted] . . . to sectarian purposes." Sec. Br. at 25, n.10. The Establishment Clause prohibits this; but, short of the type of monitoring that would constitute excessive entanglement under *Agostini*, there is no feasible way to prevent it from occurring.

In sum, the principle that the Secretary properly acknowledges as lying at the core of the Establishment

Clause—that public funds cannot be used to support religious activities—is violated by the Title VI program at issue in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals with respect to the questions presented should be affirmed.

Respectfully submitted,

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